No. 15804

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WARREN A. OTT and MORTGAGE SERVICES OF NORFOLK, INC., a Corporation,

Appellants,

vs.

HOME SAVINGS & LOAN ASSOCIATION, a Corporation,

Appellee.

APPELLANTS' OPENING BRIEF.

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Statement of Pleadings and Facts Disclosing Basis of Jurisdiction.

This in an appeal from a Judgment of Dismissal made and entered in the United States District Court for the Southern District of California, Central Division.

The only operative and effective pleading involved in this appeal is the Amended Complaint which is set forth at length at Transcript of Record, pages 8-17. To the Amended Complaint, the Defendant filed a Motion to Dismiss the Complaint, a copy of the said Motion being set forth at length in the Transcript of Record, page 18. The District Court thereupon granted the Motion of the Defendant to dismiss the action and entered a judgment of dismissal. The court's Order and Judgment are set forth in the Transcript of Record, at pages 18-21, respectively.

Jurisdiction of the United States District Court in this action is conferred by provisions of Title 28, United States Code, Section 1332, and the jurisdictional facts alleged in Paragraphs I, II and III of the Amended Complaint.

The jurisdiction of this court is based upon Title 28, United States Code, Section 1291.

The Judgment of Dismissal made and entered in the District Court in this action is a final decision of the District Court and is an appealable judgment. *Mantin v. Broadcast Music, Inc.,* 244 F. 2d 204; *Wright v. Gibson,* 128 F. 2d 865.

Concise Statement of the Case.

The Amended Complaint alleges the execution of an agreement in writing on December 31, 1953, by the terms of which agreement the Defendant, Home Savings & Loan Association, agreed to purchase from one Harold L. Shaw, or his nominee, within three (3) years from date of the said agreement, up to $7,500,000.00 worth of permanent real estate loans to be guaranteed under provisions of Servicemen's Readjustment Act of 1944, as Amended. A copy of the agreement itself was incorporated in the Amended Complaint and marked "Exhibit A". The Amended Complaint further alleges that on or about the 10th day of November, 1956, Harold L. Shaw, by an instrument in writing, designated and appointed the Plaintiffs herein as his nominee under the aforementioned agreement and by the same instrument in writing assigned, set over and transferred to the Plaintiffs all of his right,

title and interest in and to the aforesaid agreement. A copy of this instrument was likewise attached to the Amended Complaint and incorporated therein by reference and marked "Exhibit B". The Amended Complaint further alleges that after the execution of the instrument designating the Plaintiffs as nominees and assigning to the Plaintiffs all of Harold L. Shaw's rights in and to the agreement, the Plaintiffs notified the Defendant of their nomination and assignment, and between the 5th day of December, 1956, and the 8th day of January, 1957, the Defendant recognized, acknowledged and dealt with the Plaintiffs as the assignees of Harold L. Shaw.

The Amended Complaint further alleged that on or about the 20th day of December, 1956, and within three (3) years of date of execution of the agreement in writing, the Plaintiffs tendered to the Defendant and offered to sell and deliver to it $7,500,000.00 worth of permanent real estate loans of the nature and type described in the original agreement. The tender was by an instrument in writing which was attached to the Complaint and marked "Exhibit C". The Amended Complaint further alleges that the Plaintiffs duly performed all the terms and conditions of the agreement in writing, and that they were at all times ready, able and willing to perform all the terms and conditions of the said agreement. The Amended Complaint further alleged that the Defendant, in breach of its contract, failed and refused to purchase from the Plaintiffs the said real estate loans, and that as a direct and proximate result of the acts of the De-

fendant the Plaintiffs were damaged in the sum of $237,135.80.

The entire Amended Complaint and all of the exhibits and documents referred to in the Complaint are set forth in full in the Transcript of Record at pages 8-17.

The Defendant herein thereupon filed its Motion to dismiss the Complaint. The Motion to dismiss the Complaint was made upon two grounds: (1) The Amended Complaint fails to state a claim upon which relief can be granted; and (2) The Amended Complaint fails to join an indispensable party. A copy of the Motion is set forth in the Transcript of Record at page 18.

Question Presented.

A single question is presented by this appeal. It may be succinctly stated, as follows: Did the District Court err in entering a judgment of dismissal on the Amended Complaint in this action?

An analysis of this basic question reveals three pertinent subsidiary questions. They are:

(a) Does the use of the words "or his nominee" constitute a covenant against assignment?

(b) Is the determination of whether the use of these words constitute a covenant against assignment a question of law or is it a question of fact to be determined upon trial?

(c) If these words do constitute a covenant against assignability, is there an issue of fact as to waiver to be determined on trial of the case?

ARGUMENT.

I.

The Court Erred as a Matter of Law in Granting Defendant's Motion to Dismiss and in Entering Judgment of Dismissal on the Amended Complaint.

The Agreement of December 31, 1953 [T. R. pp. 13-14] makes no reference to assignability. The District Court in its Judgment of Dismissal upheld the contention of the Defendant, however, that the use of the words "or his nominee" in the agreement of December 31, 1953, constituted in effect a covenant against assignability of the agreement.

Inherent in the Judgment of Dismissal are certain necessary findings of fact and law by the trial court. The following implied or expressed findings are not supported by the facts and are erroneous as a matter of law:

A. That the contract of December 31, 1953, was not an assignable contract (this is a mixed question of law and fact).

B. That the Plaintiffs were not and could not as a matter of law be assignees of the contract and that the assignment to the Plaintiffs was invalid or of no legal effect.

C. That the Defendant did not or could not waive or consent to an assignment of the contract to the Plaintiffs if the same were nonassignable (this is also a mixed question of law and fact).

D. That the Defendant could not be estopped as a matter of fact or of law to deny the validity of an assignment to the Plaintiff (this is a mixed question of law and fact).

E. That the Plaintiffs' assignor, Harold L. Shaw, was an indispensable party to the action as a party plaintiff.

It is respectfully submitted that certain basic considerations are applicable in the determination of the question involved on this appeal. The facts as alleged in the Amended Complaint were not put in issue and, therefore, for purposes of determination of the Motion to Dismiss, the Court was required as a matter of law to consider as true all of the allegations of the Complaint. For purposes of consideration of the Motion to Dismiss, the court on appeal must also consider all of the allegations of the Complaint as true. *Leimer v. State Mutual Life Assurance Co.* (C. C. A. 8th), 108 F. 2d 203; *Yuba Consolidated Gold Fields v. Kilkeary* (C. C. A. 9th), 206 F. 2d 884.

Also on a Motion to Dismiss, the allegations of the Complaint must be viewed in a light most favorable to the Plaintiff. *Sidebothan v. Robison* (C. C. A. 9th), 216 F. 2d 816; *Yuba Consolidated Gold Fields v. Kilkeary* (C. C. A. 9th), 206 F. 2d 884.

Further, it has become well established that a Motion to Dismiss should be granted sparingly and with caution, and that serious questions of law should not be disposed of summarily by a Motion to Dismiss. *Chicago and Northwestern Railway v. Chicago Packaged Fuel Company* (C. C. A. 7th), 183 F. 2d 630. It has been held that in breach of contract actions where meaning of the contract is doubtful, questions relating to the interpre-

tation or the meaning of the contract should not be decided on a Motion to Dismiss but should be held for full trial. *R. E. Crummer v. Nuveen* (C. C. A. 7th), 147 F. 2d 3, 157 A. L. R. 739. Matters relating to proper construction of a contract sued upon should not be determined on a Motion to Dismiss but should be reserved to full trial. *McLaughlin v. Union Switch & Signal Co.* (C. C. A. 3rd), 166 F. 2d 46.

Defendant's Motion to Dismiss is based on the Defendant's argument that (1) the contract of December 31, 1953, by its terms, was nonassignable; and (2) assuming that it was nonassignable, the assignment executed by Harold L. Shaw in favor of the Plaintiffs could confer no rights on the Plaintiffs as assignees, and (3) if the Plaintiffs sought to maintain the action as a nominee of Shaw, as distinguished from his assignee, then they must, of necessity, join Harold L. Shaw as a party plaintiff since a nominee as such and standing alone may not maintain an action in his capacity as nominee.

Plaintiffs concede that if the assignment to them fails and if they are mere nominees of Harold L. Shaw and not assignees of Harold L. Shaw's rights in and to the agreement, then it would be necessary for Harold L. Shaw to be joined with the Plaintiffs. But Plaintiffs urge and contend that (1) the contract does not by its terms contain any covenant against assignment, and (2) the assignment to the Plaintiffs by Shaw of all of his rights in and to the contract was a valid and enforceable assignment, and (3) that even if the agreement by its terms could be held to be nonassignable, under the applicable state law such nonassignability can be waived, and that in this case the Defendant did in fact, by its conduct, waive any restriction against assignability if indeed the agreement was in fact nonassignable.

Appellants further contend that all of these issues turn on questions of fact or on mixed questions of law and fact and should be determined upon trial rather than by a motion to dismiss the action.

In support of Plaintiffs' contentions, the following propositions of law are respectfully urged:

A. The Law of California Favors the Interpretation of the Assignability of Contracts Over Nonassignability.

1. The general rule is that in the absence of an express covenant against assignments, a contract which does not involve personal skill, trust or confidence is assignable without the consent of the other party.

Larue v. Groezinger, 84 Cal. 281, 24 Pac. 42;

Panhandle Lumber Co. v. Mackay (9th Cir.), 21 F. 2d 916.

2. Assignability of rights under a contract must be determined by the law of the jurisdiction where the contract was executed. The agreement by its terms was executed in the State of California.

Dix v. Bank of Cal. Nat. Assn., 113 Fed. Supp. 823, affd. 205 F. 2d 957.

B. Assignability of a Contract Is the Basic Policy of the Law, Nonassignability the Exception.

1. In the case of *Larue v. Groezinger,* 84 Cal. 287, 24 Pac. 44, the Supreme Court used the following language:

> "If the language of the contract does not exclude the idea of performance by another and the nature of the thing contracted for or the circumstances of the case do not show that the skill, credit or other personal quality or circumstance of the party was

a distinctive characteristic of the thing stipulated for or a material inducement to the contract then the contract is assignable."

2. In *Rued v. Cooper,* 109 Cal. 682, 34 Pac. 98, the Supreme Court of California, used the following language:

> "Assignability of things in action is now the rule, nonassignability the exception, and this exception is confined to wrongs done to the person, the reputation, or the feelings of the injured party and to contracts of a purely personal nature like promises of marriage."

3. The statutes of the State of California favor free assignability.

Cal. Civ. Code, Secs. 954, 1044, 1458;

Webb v. Pillsbury, 23 Cal. 2d 324, 144 P. 2d 1;

Everts v. Fawcett, 24 Cal. App. 2d 213, 74 P. 2d 815;

Jackson v. Deauville Holding Co., 219 Cal. 498, 27 P. 2d 643;

Wilkstrom v. Yolo Fliers Club, 206 Cal. 461, 274 Pac. 959.

C. The Language of the Contract Does Not Specifically Covenant Against Assignability.

1. While the law of the State of California favors assignability rather than nonassignability, nevertheless, the parties to a contract may specifically contract against assignability.

Murphy v. Luthy Battery Co., 74 Cal. App. 68, 239 Pac. 341.

2. However, covenants restricting assignability, being contrary to the general policy of the law which favors

assignability, require clear and unequivocal language and are strictly construed. In discussing this same problem, the Supreme Court of the State of New York in the case of *Allhusen v. Caristo Construction Company,* 303 N. Y. 446, 103 N. E. 891, used the following language:

> "Clear language should, therefore, be required to lead to the conclusion that the certificates are not assignable. We cannot deduce such consequence from uncertain language."

3. In the absence of clear and unequivocal language to the contrary, assignability of contractual rights is favored in the law. The Supreme Court of California declared, as follows: "It hardly needs citation of authority to the principle that covenants limiting the free alienation of property such as covenants against assignments are barely tolerated and must be strictly construed", in the case of *Chapman v. Great Western Gypsum Co.,* 216 Cal. 420, 14 P. 2d 758.

4. If the agreement is ambiguous as to the question of assignability, such ambiguity must be resolved against the person creating the ambiguity. Here the agreement was written by the Defendant and any ambiguity, at least at the dismissal stage, should be resolved against the Defendant.

Cal. Civ. Code, Sec. 1654.

5. In the final analysis, the interpretation of any contract lies in the intention of the parties. Intent is always a question of fact and should be determined after a trial on the merits rather than by means of a motion.

D. The Use of the Words "or His Nominee" Does Not Preclude the Possibility of an Assignment.

1. The use of the phrase in the agreement of December 31, 1953 [T. R. pp. 13-14], "to your nominee" in no way connotes a restriction against assignment but on the contrary expressly indicates the intention of the parties not to restrict the dealings to the named party but to deal with another party or grantee of such party. Webster's New International Dictionary, Second Edition, Unabridged, 1948, defines "nominee", as follows: "The person named, as the recipient in an annuity or grant".

2. In the *Schuh Trading Co. v. Commissioner of Internal Revenue* case, 95 F. 2d 404, 411 (7th Cir.), the court used the following language: "The word 'nominee' ordinarily indicates one designated to act for another as his representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another in representation of another *or as grantee of another*". (Italics ours.)

Pursuing the term "grantee" as the same is used in the dictionary definition and in the foregoing *Schuh* case, we find that the term "grantee" is synonymous with "assignee". The terms are, therefore, interchangeable.

Nolan v. City of New York, 39 N. Y. S. 2d 360, 179 Misc. 1011;

Ely v. Commissioner, 49 Mich. 17, 12 N. W. 893;

Black's Law Dictionary, 4th Ed., p. 152.

The only case in California (and in any other state for that matter) purporting to define, judicially, the term "nominee" is *Cisco v. Van Lew,* 60 Cal. App. 2d 575, 141 P. 2d 433.

In the case of *Cisco v. Van Lew,* 60 Cal. App. 2d 575, 141 P. 2d 433, a person designated as a nominee instituted an action for specific performance to compel the other party to the escrow to perform his terms of the escrow. The court pointed out that no assignment was made by the original party to the escrow in favor of the nominee. The question then presented to the court was whether or not a person designated as a nominee could, in the absence of an assignment, enforce by specific performance the provisions of an escrow. The court in that instance indicated that the mere designation of a nominee gave such a person no right of specific performance, and in that connection the court used the following language:

> "In the absence of an assignment from McGuire to the Ciscos or some other effective substitution of the Ciscos for McGuire as the purchasers, no rights became vested in the Ciscos which they are entitled to assert on their own behalf independently of McGuire".

The language of the case clearly implies that the designation of a nominee is not repugnant to an assignment of contractual rights to such nominee. The court clearly stated, "In the absence of an assignment . . . no rights became vested in the Ciscos".

It is respectfully submitted that the *Cisco v. Van Lew* case is not authority for the proposition that a nominee cannot be an assignee, nor is it authority for the proposition that use of the term "nominee" excludes possibility of a person named as a nominee from being an assignee if a proper assignment is made by him. Neither is the case authority for the proposition that the use of the term "nominee" precludes or prevents assignability of the contract.

Defendant herein concedes that under authority of the *Cisco v. Van Lew* case in the absence of an assignment of the Shaw contract to the Plaintiffs herein, the Plaintiffs would have no rights to specific performance of the agreement in their own names as nominees without joining Mr. Shaw as a party plaintiff. However, in this case, the Plaintiffs herein secured a valid assignment of all of Shaw's rights in writing, and gave timely notice of the assignment to the defendant. As such, therefore, they are not acting as mere nominees but are acting as assignees of Shaw's rights under the agreement.

It is, therefore, respectfully submitted that the trial court was not justified in holding as a matter of law that the use of the term "or his nominee" was the equivalent of an express covenant against assignability. It is respectfully submitted that the use of the term "nominee" does not as a matter of law exclude the possibility of assignability.

By its very definition a nominee may be also a grantee (which is synonymous with assignee). To hold that the possibility of assignment is precluded, goes contrary not only to definition but also to the policy of the law of California which favors the interpretation of assignability over nonassignability.

E. The Meaning of the Words "or His Nominee" May Properly Be Explained on Trial by Parol Evidence.

1. The contract is silent as to the question of assignability. It is not necessary to resort to parol evidence to vary or explain the term "nominee".

2. But assuming for purposes of argument that the use of the term "nominee" may connote by definition an intention against assignment, the parties to the action should be permitted to explain the custom and usage of

the words "or his nominee" as the same are used in the trade and business of buying and selling mortgages. The District Court of Appeal of the State of California in the case of *Body Steffner v. Flotill Products, Inc.*, 63 Cal. App. 2d 555, at page 558, 147 P. 2d 84, used the following language:

> "It is the rule of practically universal acceptation in common law jurisdiction that however clear and unambiguous the words of a particular contract may appear on its face it is always open to the parties to the contract to prove that by the general and accepted usage of the trade or business in which both parties are engaged and to which the contract applies the words have acquired a meaning different from their ordinary and popular sense".

This language was approved in the very recent case of *Peskin v. Squires,* 156 A. C. A. 268.

3. Likewise, in connection with the construction of a contract or the interpretation of words used therein, it is proper for the court to consider the practical construction given to the contract by the parties and their conduct thereunder. *Maguire v. Lees,* 74 Cal. App. 2d 697, 169 P. 2d 411.

4. Evidence of the circumstances surrounding an agreement and subsequent conduct of the parties thereto as affecting the intention of the parties is admissible by parol evidence.

Cal. Civ. Code, Secs. 1647, 1655, 1644, 1645;
Norton v. Whitehead, 84 Cal. 263, 24 Pac. 154.

F. The Nature of the Contract Does Not Favor an Interpretation Against Assignability.

1. Option agreements and all benefits under the same may be assigned in the absence of an express provision to the contrary.

Tatum v. Levi, 117 Cal. App. 83, 3 P. 2d 963.

2. The agreement in question does not stipulate or provide either as a fact or as a matter of law that it is a personal service agreement requiring the personal skill, trust or confidence of Mr. Shaw. The agreement is to purchase items of property, to-wit, mortgages, secured and guaranteed by an instrumentality of the Government. On the face of the agreement, no personal service or personal skill, trust or confidence is involved any more than in the purchase of any object of property by one person from another. If personal service or skill of Mr. Shaw was intended by the parties, such fact is one of defensive material and may be shown by the defendant upon trial, but should not be determined upon a Motion for dismissal. On its face, no personal skill is involved and none should be inferred on a Motion to Dismiss.

G. Even a Covenant Against Assignability May Be Waived by the Parties.

1. Assuming for purpose of argument only that the use of the term "or his nominee" was the equivalent of an express covenant against assignment, such a covenant against assignments may be waived by the parties by sub-

sequent dealings with the assignee or by recognizing the status of the assignee as a real party in interest.

Trubowitch v. Riverbank Canning Co., 30 Cal. 2d 335, 182 P. 2d 182;

California Packing Corp. v. Lopez, 207 Cal. 600, 279 Pac. 664;

Maguire v. Lees, 74 Cal. App. 2d 697, 169 P. 2d 411.

2. The issue of the waiver of even an express contractual covenant against assignment is a question of fact and as such should be determined upon trial of the action and should not be disposed of on motion for dismissal.

Maguire v. Lees, 74 Cal. App. 2d 697, 169 P. 2d 411.

3. The ultimate fact of a waiver was pleaded in the Amended Complaint [Paragraph IX, Amended Complaint, T. R. p. 11].

4. If a party to a contract with knowledge of an assignment recognizes and deals with the assignee, the right to object to an assignment is waived.

5 *Cal. Jur.* 2d (Assignments), p. 294.

H. Motions to Dismiss Should Not Be Granted Unless It Appears Certain That the Plaintiff Would Be Entitled to No Relief Under Any State of Facts Which Can Be Proved in Support of Its Claims.

The test is whether or not in the light of facts pleaded which are most favorable to the Plaintiff, and indulging in every intendment regarded in its favor, the complaint is sufficient to constitute a valid claim.

United States v. Thurston County, 54 Fed. Supp. 201, affd. 149 F. 2d 485, cert. den. 326 U. S. 744, 66 S. Ct. 58, 90 L. Ed. 444;

Frederick Hart v. Recordgraph Corp., 169 F. 2d 580;

Barron and Holtzoff: Federal Practice and Procedure, Volume 1, pages 604 ff.

I. The Assignees Are Proper Parties Plaintiff to This Action and It Is Not Necessary to Join the Assignor as a Party Plaintiff.

1. Plaintiffs assert their right to maintain this action as the owners and holders of all of Harold Shaw's rights under the agreement by virtue of their assignment from Shaw. An assignment carries with it all of the rights of the assignor including the right to maintain legal action by the assignees alone and in their own name.

Union Supply Co. v. Morris, 220 Cal. 331, 30 P. 2d 394;

Cal. Civ. Code, Sec. 1084.

2. Only if it is held that as a matter of fact and of law that (1) Plaintiffs herein are not assignees but mere nominees only and (2) further that the agreement is not capable of assignment and (3) that the restriction against assignment is not capable of being waived, does it become proper to hold that Harold Shaw need be joined as a party plaintiff. It is submitted that none of these conclusions is warranted in this case.

Summary of Arguments.

As a summary of Appellants' contentions, it is respectfully submitted that the judgment of dismissal should be reversed for the following grounds:

1. The agreement is silent as to the matter of assignment.

2. The use of the words "or his nominee" is not the equivalent in law or in fact of a covenant against assignability.

3. The law of California with reference to assignments favors interpretation of assignability over non-assignability.

4. All questions of fact should on a motion to dismiss be resolved in Appellants' favor.

5. Questions of assignability relate to the intent of the parties which should be determined upon trial, not on a motion to dismiss.

6. Even if the words "or his nominee" can be construed to be the equivalent of a covenant against assignability, such a covenant is subject to waiver by the conduct of the parties. Waiver is a matter of fact to be determined upon trial.

Conclusion.

It is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded with instruction to the District Court to require the Defendant to plead to the Amended Complaint.

Respectfully submitted,

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